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Supreme Court U.S.

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No. 07-

IN THE

Supreme Court of the United States

JAN TOKARZ, d/b/a JJ Store,

Petitioner,

v.

LOT POLISH AIRLINES, a/k/a
POLSKIE LINIE LOTNICZE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case alleging violation of Section One of the Sherman Act, 15 U.S.C. § 1, what is the proper standard for lower courts to use to differentiate whether a supplier (here, an airline) joined a horizontal conspiracy of distributors (here travel agents) seeking to put a discounting rival out of business, rather than merely independently responding to their complaints?

2. Are findings of fact as to whether the supplier acted independently "clearly erroneous" if the trial court evaluated the record using an incorrect legal standard?

3. Inasmuch as the airline was the dominant carrier on the route, and its contracts with agents contained a clause that expressly purported to prohibit use of commissions to discount tickets, did the lower courts have to evaluate whether the airline's enforcement of that provision, and the manner of its enforcement, had a significant unreasonable effect upon competition, by increasing ticket prices and artificially raising the commissions retained by the conspiring agents?

PARTIES

A list of all parties to the proceeding in the Court whose judgement is the subject of this petition is as follows:

1. Petitioner, Jan Tokarz, owns a general store in the Greenpoint section of Brooklyn, New York, under the doing business name J.J. Store ("JJ").

2. Respondent, LOT Polish Airlines ("LOT"), is a commercial airline corporation owned by the Government of Poland, originally as LOT's sole owner and as majority owner today.

3. In the proceedings in the trial court, there were several additional parties, although none participated in the appeal to the United States Court of Appeals for the Second Circuit for which review is sought, and none is currently a party:

a. In Case No. 96-CV-3154 (FB) (JMA) (E.D.N.Y.), styled *Tokarz v. LOT Polish Airlines, et al.*, three additional closely held corporations were defendants: Millenium Travel, Inc., P & F International, Inc., and American Travel Abroad, Inc. The matter has been concluded as to all of these parties, see App. C at 8a, note 1.

b. In a related case, Case No. 00-CV-3372 (E.D.N.Y.), styled *Tokarz v. Albatross Travel, et al.*, the following closely-held corporations were also defendants: Albatross Travel Agency, Inc., Bartosz Travel Agency, Inc., Karwowski Agency, Turysta Travel Agency, Inc. and Norman Travel & Trading Services. That matter has been voluntarily dismissed without prejudice.

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OPINIONS AND ORDERS BELOW

1. The summary order of the United States Court of Appeals for the Second Circuit in *Jan Tokarz d/b/a J.J. Store, Plaintiff-Appellant v. LOT Polish Airlines*, Defendant-Appellee, C.A. No. 06-5574, dated December 21, 2007, affirming the district court's judgment of dismissal, is set forth in Appendix A hereto, at 1a-4a. The Summary Order is not officially reported in the *Federal Reporter, Third*. It has been published unofficially at 2007 WL 4480701 (C.A.2) and at 2007-2 Trade Cases Paragraph 75,983. Petitioner's motion for rehearing or rehearing en banc was denied by unpublished order filed March 4, 2008, set out in Appendix D hereto, at App. 20a-21a.

2. The United States District Court for Eastern District of New York, issued a September 29, 2006 Memorandum and Order, entered on the district court's docket October 3, 2006, dismissing Petitioner's complaint. That opinion is set forth in Appendix C hereto, at 7a-19a. It is not officially reported in the *Federal Supplement, Second*. It has been unofficially published at 2006 WL 2850611 (E.D.N.Y.) and at 2006-2 *Trade Cases* (CCH) ¶ 75,447. The District Court Clerk's Judgment pursuant thereto, dated November 3, 2006, entered on the docket November 6, 2006, is set forth in Appendix B hereto, at 5a-6a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment on December 21, 2007. Appendix A, 1a-4a.

A timely petition for rehearing or rehearing en banc was denied by Order dated March 4, 2008. Appendix D. This petition for certiorari is being filed within 90 days thereafter, as permitted by 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section One of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is hereby declared to be illegal."

STATEMENT OF THE CASE

1. ***Nature of this action and the original jurisdiction of the United States District Court.***

JJ brought this case pursuant to Section One of the Sherman Act, 15 U.S.C. § 1. The district court had original jurisdiction pursuant to 15 U.S.C. § 15, and 28 U.S.C. § 1331(a). The district court also had original jurisdiction pursuant to 28 U.S.C. §§ 1330 and 1602-11 inasmuch as defendant LOT is a commercial agency or instrumentality of the Government of Poland.

2. *Factual Background*

a. JJ operates a store in the Greenpoint section of Brooklyn, New York. JJ sells a wide variety of goods and services to the ethnic Polish community there, including travel service and airline tickets. Greenpoint has one of the highest concentrations of Polish immigrants in the United States. App. C, 10a. Many of the immigrants prefer to transact business in the Polish language, and many of them have needs to travel to Poland for business or family matters.

In 1995-1996, when the events at issue took place, LOT, Poland's national airline, offered the only non-stop flights between the United States and Poland. App. C., 8a. LOT was and remains the dominant carrier on the route. LOT flies more than half of all passengers between the United States and Poland. E202, E602.[1] LOT's unique position makes the ability to sell tickets on LOT critically important for anyone trying to serve the needs of travelers to Poland. LOT tickets represented a huge portion of both JJ's and its rivals' travel business — for most of them, eighty percent or more of their ticket sales. T13-15; T102-03; T199.

b. LOT compensates agents who sell its tickets with commissions. LOT allows all agents to deduct ten

[1] The record at the United States Court of Appeals for the Second Circuit in Appeal No. 06-5574-cv is contained in a series of bound appendices, all of which are available to this Court: citations to "E __" reference pages of the trial exhibit volume; citations to "JA __" reference the pleadings and other submissions contained in the parties' Joint Appendix; and citations to "T __" reference the trial transcripts.

percent of the published ticket price as a basic commission. LOT also enters into "Volume Override Commission Agreements," or "VOCAs," with select travel agencies. App. C, 8a-9a. These VOCAs provide incentives to achieve higher sales volumes: the agent can deduct a higher-than-basic commission at the "front end"; LOT separately pays an additional commission at the end of the year, depending on the volume achieved during that year. VOCA agents can also allow the enhanced overrides to subagents as an inducement to place orders through the VOCA agent, a practice referred to as "wholesaling" or "consolidating."

Paragraph 7 of the VOCAs uniformly provides that "No portion of the override commission paid may be used in any way to reduce the airfare paid by the passenger below LOT published transatlantic tariffs. App. C, at 9a. LOT interpreted this provision to permit agents to create discounts by using the retained portion of their commissions and overrides, or rebating them to customers, so long as they do not discount the ticket by more than the total commission they receive from LOT. T500, T502. Using commissions and overrides to give discounts was a widespread practice in the marketplace. T200, E152ff. LOT was generally indifferent to agent discounting and rarely invoked Paragraph 7 to control agent pricing. App. C at 17a; *id.* at 13a, Findings ##25-26.

c. JJ began to sell LOT tickets as a subagent for so-called consolidators in 1990 even before it became an accredited agency. In 1995, JJ advised LOT that it planned to obtain accreditation from the Airlines Reporting Corporation ("ARC") and International

Airline Travel Agents Network ("IATAN") so it could work directly with airlines and develop its own network of subagents. LOT welcomed this enthusiastically. LOT knew even then that JJ offered the lowest ticket prices in Brooklyn. E610. In May 1995, as soon as JJ achieved ARC and IATAN accreditation, LOT appointed JJ as a direct agent, immediately gave it a VOCA for 1995, and encouraged JJ to continue to discount aggressively. App. C at 10a; E61, T209-11, E755.

d. Like all of its competitors, JJ discounted LOT's tickets. The only difference was that JJ gave deeper discounts than they did. LOT enabled JJ to do so by giving JJ a more favorable VOCA than most of the agents in Greenpoint. On top of that, JJ used nearly all of its front-end commissions to create discounts, while other agents tried to retain at least $25 per one way or $40 roundtrip - roughly six percent of the published fares - from the retained front-end commission. App. C, 11a, Finding ##13-17. JJ was willing to forego that upfront profit in the expectation that, through its efficiency and diversified business it could sustain its operations, grow its volume of sales, and reap substantial back-end override payments from LOT. App. C, 11a, Finding #16.

JJ's sales strategy was a great success and it grew rapidly. But it stirred up resentment from rival agencies. LOT rebuffed individual complaints by a suggestion that the complainer "put it in writing," App. C, 11a, Finding #18. The complaints nevertheless prompted LOT to write a letter to JJ in December 1995 that asked JJ to bring its prices into line, not with LOT's published fares, but the "retail prices" charged by JJ's rival agents. E15. *See also* App. C at 12a.

e. LOT met with JJ in early January 1996, to discuss a new VOCA for 1996. LOT's representative, Pawel Lodzinski, advised that he was becoming uncomfortable with two aspects of JJ's conduct — first, he was receiving complaints from other agents; second, he wanted to make sure that JJ was not losing money on its ticket sales, as that could prevent JJ paying over the net sums due to LOT. E20. As to the first point, JJ said it would not comply with its rivals' pricing and planned to continue its sales strategy, which it urged LOT was in their mutual interest. *Id.* As to the second point, JJ assured LOT it was making money. JJ also offered to increase the bond it maintained with the ARC (through which all sales cleared) as security for the airlines, so that LOT would not have any credit risk at all, but LOT said that would not be necessary. *Id.*

Following the meeting, LOT granted JJ a new VOCA for 1996. App. C at 10a, Finding #13. This 1996 VOCA issued in January 1996 *increased* JJ's margins at even lower sales volume relative to its competitors, E12-13, and was designed to jump start JJ's sales and facilitate its continued discounting. T221-22. Accordingly, JJ continued to sell as it had before, and LOT made no further complaints about JJ's selling practices — until the Greenpoint Agents formed their conspiracy in the spring of 1996.

f. Having failed to get a favorable response to his individual complaint, and facing erosion of retained commissions due to JJ's price competition, one agency, Albatross, sought to organize as many agents as possible to help drive JJ out of business. T19-20; 466, E499. Ultimately, Albatross enlisted at least six other

agencies in Greenpoint in a conspiracy dedicated to cutting off JJ's supply of tickets from any sources, and to cause JJ to lose its IATAN accreditation (collectively the "Greenpoint Agents").

The Greenpoint Agents' first salvo was to concertedly put pressure on LOT to terminate JJ. T19-20, T155, E466, E499. The six largest — and besides JJ, the only accredited — travel agents in Greenpoint — Albatross Travel, Bartosz Travel, Karwowski Agency, Turysta Travel Agency, and Greenpoint Travel — collectively signed a petition to LOT dated April 16, 1996. Their petition demanded that LOT "reevaluate" its dealings with JJ and eliminate "chaos" in the market. E31-32.[2] App. C at 12a, Finding #20. The agents copied this petition not only to LOT but to major consolidators, which, but for the conspiracy, could have provided JJ with cheap tickets on a subagency basis.

Immediately upon receipt of the Greenpoint Agents' concerted Petition of April 16, LOT wrote a letter to JJ dated April 22, 1996, E26-27, App. C at 12a, Finding #21, cutting off JJ's override commissions to prevent its discounting. LOT also refused to furnish certain tickets and threatened other sanctions, T225-26, all in an effort to coerce JJ to raise its prices to the levels demanded by the Greenpoint Agents. *Immediately* after the conspirators made a further push in May 1996, seeking to drive JJ out of IATAN, *see below*, LOT sent a further letter to JJ calling on it to fall in line with its rivals.

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[2] These six signatories were also all members of the Society of Polish American Travel Agents, E104-05, a trade association having as its stated purpose the elimination of "unnecessary competition." E108.

App. C at 12a, Finding #22; E29-30. Ultimately, on June 12, 1996, LOT peremptorily removed its ticketing plate from JJ's premises, precluding JJ from issuing its tickets at all. App. C, 13a, Finding #23.

g. The district court's opinion and factfinding erroneously stopped at this point in the case. The trial record, however, was substantially more extensive and robust regarding the scope of the agents' conspiracy, the leverage they held over LOT, LOT's participation in their conspiracy and the effects of that participation:

(i) John Conlon, who was the LOT employee sent to remove the ticketing plate, testified as a witness for LOT that LOT terminated JJ "because there had been complaints from the travel agency industry in the Greenpoint area that [JJ] was discounting the market." T488. LOT's executives similarly admitted to JJ that its actions were being forced upon it by the agents. T229-30, T235. LOT constantly communicated with the conspirators, T563, and attempted to reassure them they had its support, even sharing a May 1996 letter with Albatross before delivering it to JJ, E756-57, and pledging to agents that "We do keep . . . an eye on J & J." E35, T496. The district court failed to refer to this evidence.

(ii) In the meantime, besides attacking JJ's sources of tickets, the Greenpoint agents were also trying to revoke JJ's IATAN accreditation. Success in that endeavor at that time could have potentially have stripped JJ of the ability to represent any other airlines in competition with them. The agents not only had copied IATAN on their April 16, 1996 petition to LOT;

during May 1996, several of the original conspirators, joined by a seventh Greenpoint agency, Norman Travel and Trading Services, wrote a series of letters to IATAN, e.g., E33, E40, T330-31, complaining about JJ's sales practices — indeed, one of these letters noted that it was written together "with the agencies listed below," and listed the conspiring Greenpoint agents. E40. Their complaints, IATAN concluded after investigation, were really motivated by the "the fact that [JJ] is discounting LOT tickets." E47. The district court failed to refer to this evidence.

(iii) LOT's conduct did not stop with a simple refusal to deal. LOT actively assisted the conspirators' broader goals of preventing JJ competing with them in any manner. For example, LOT refused to pay sums owed JJ, thereby keeping it under financial pressure. E132, E151, T288-90. LOT also communicated with the ARC to disrupt JJ's purchasing tickets from American Airlines. E55, E56, T245-46. The district court failed to refer to this evidence.

(iv) Significantly, LOT's VOCA, with its express controls on agent pricing, was a contract that set prices. As found by the trial court, LOT's invocation of the price term in the VOCA was "inconsistent" (App. C at 16a), "a departure from its usual indifference to agents' use of their commissions to create customer discounts," (*id.* at 17a), and had been invoked only rarely. *Id.* at 13a, Finding #26 (referencing only two prior occasions). In fact, it was used not to maintain prices set by LOT but prices set by the conspiring agents. In this way, LOT's contract with JJ and the others became

a hub-and-spoke arrangement that gave JJ's horizontal rivals control over JJ's prices. The district court failed to refer to this evidence.

(v) LOT's termination of JJ and the control it gave JJ's rivals over prices caused considerable harm to the public. Once JJ was prevented from continuing to sell on a discounted basis, prices paid by Greenpoint customers for roundtrip, non-stop tickets between New York and Warsaw increased by 4.4% as compared with the prices that would have prevailed otherwise. E184-85. The conspirators profited — their retained commissions *doubled*. The traveling public suffered from these higher charges. E155, E161-64, E178-79. (JJ suffered damages as well, losing $850,000 in profits and more than $80,000 in out of pocket costs. E152ff.) The district court failed to refer to this evidence.

(vi) While the results of complying with the agents' conspiracy were not attractive to LOT or in its independent interests, LOT could not have ignored the conspirators demands. When they acted collectively and in concert as an unlawful conspiracy, the Greenpoint Agents held considerable leverage over LOT. Greenpoint represented a substantial market for LOT and the Greenpoint Agents were the largest ticket sellers other than JJ in that market. T155. The extent of their power becomes evident not only from how quickly LOT kowtowed to their pressure, but also from the economic data: once LOT terminated JJ as a direct sales agent, virtually all of JJ's lost sales were captured by the conspiring agents. They could not have kept those passengers if other agents were significant factors in the market. E152,E155-62, T388-90. The district court failed to refer to this evidence.

3. *The District Court's rulings*

a. Because LOT is a foreign sovereign, trial proceeded as a bench trial before the District Court judge. *See* 28 U.S.C. §§ 1330, 1602-11. The district court found that LOT had repeatedly expressed concern about JJ's discounting, Findings 19, 21, 22 and 24, App. C at 12a-13a, and terminated JJ for reasons independent of the demands of the Greenpoint agents. App. C at 14a. In particular, the district court found the Greenpoint Agents' April 1996 petition asking LOT to "reevaluate" its dealings with JJ contained no express demand by the agents for LOT to stop dealing with JJ and no express threat that the agents would cease dealing with LOT. Finding # 20, App. C at 12a. The district court found that LOT viewed the petition as "nothing more than a complaint by six of JJ's 30 to 40 competitors," rather than a coercive demand. App. C at 16a-17a. The district court noted that LOT, absent agreement with the agents, could choose to enforce Paragraph 7 of the VOCA, which prohibited use of override commissions to create discounts, against JJ. Finding #17, App. C at 11a; *id.* at 15a and 17a. The district court, while acknowledging that all agents discounted, found that JJ's use of its entire front end commission permitted LOT to treat JJ's conduct differently than other agents who retained at least some of the front end commissions. Findings ##25 and 26, App. C at 13a; *id.* at 17a.

c. While the district court had noted during the trial that most of LOT's proffered reasons for termination were baseless, T555,[3] the district court found that JJ's

[3] Over time, LOT proffered various reasons for the termination including the alleged condition of JJ's business premises, lack of sales effort and the like, but these claims were pretexts and were rejected by the district court. T555.

use of the entire front end commission created "a credit risk" and "disrupted the incentive to sell LOT tickets." Finding #25, App.C at 13a. The district court found that "on at least two other occasions," LOT terminated agents who had used all their upfront commission to create discounts. Finding #26, App. C at 13a.

d. The district court found that JJ's position did not make economic sense because LOT, "which competes, to some extent, with other airlines," would have "no economic incentive to assist its agents in increasing their retained commissions." Finding #27, App. C at 14a.

The district court's opinion, however, did not refer to the trial testimony, T235, T229-30, showing that LOT's executives said they felt they had to do as the conspirators demanded; the district court also made no reference to LOT's witness's in-court admission that LOT acted "because" of those agents' concerted demands. T488. The district court also ignored JJ's demonstration that LOT's arguments about the risks to JJ's creditworthiness or disruptions of incentives were pretexts — by way of example, the district court did not address the evidence showing that JJ had offered a bond that would have protected LOT against insolvency, and did not address the lack of any evidence that LOT had ever even sought to inquire about, much less investigate, JJ's credit or solvency. The district court also failed to note that the travel agents LOT had previously terminated were not terminated merely for discounting, but because they had issued LOT tickets without paying for them. T489-90. (In contrast, JJ had met all its financial obligations to LOT. T493.) Finally,

having decided LOT had not entered any agreement or conspiracy, the district court did not analyze the market power held by the conspiring agents in the aggregate and the evidence showing the effects of LOT's actions on the marketplace.

4. ***The Court of Appeals' rulings***

a. JJ timely appealed the district court's judgment to the United States Court of Appeals for the Second Circuit. JJ's appeal raised two questions - first, whether the lower court erred by evaluating LOT's conduct as a unilateral, vertical decision to stop dealing with JJ, rather than as part of a larger conspiracy of the agents; second, whether the district court had committed clear error in failing to address the acknowledgment that LOT acted because of the demands of the conspiring agents and in overlooking the evidence that LOT's stated concerns about JJ's creditworthiness and incentives was a pretext.

b. The Court of Appeals affirmed in a summary order. Appendix A, 1a-4a. The panel opinion acknowledged that "'the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act' is a matter of law, reviewed *de novo.*'" App. A at 3a, quoting *United States v. General Motors Corp.*, 384 U.S. 127, 142 n. 16 (1966). The panel opinion further agreed that the conspiracy could be established "either through a voluntary agreement on LOT's part, with the Greenpoint Agents, or as a result of unlawful pressure on LOT by the Greenpoint Agents." *Id.* However, the court concluded that JJ's trial evidence did not make

out either ground. The court ruled that the evidence at trial was not "sufficient to establish that LOT voluntarily engaged with the Greenpoint Agents in a conspiracy to boycott J.J. Store." App. A, at 3a.

c. The Court of Appeals then turned to the issue of whether LOT had joined the conspiracy under pressure from the agents, "a claim which, if supported, would make LOT's action an impermissible refusal to deal in aid of a horizontal conspiracy by the non-terminated Agents." App. A at 3a-4a, citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S.Ct. 2705, 2717, 168 L.Ed.2d 623 (2007). Without commenting that the district court had failed to apply that legal standard, the court of appeals ruled that such claim "fails on the facts found by the district court," App. A at 4a, which it concluded were not "clearly erroneous." *Id.*

REASONS FOR GRANTING THE PETITION

The trial record, taken as whole, unambiguously shows that LOT did not act independently, on its own, entirely for its own business reasons, pursuant to terms announced in advance. Instead, LOT changed the rules of the game when it was enlisted in and pressured into becoming a member of ". . . a classic conspiracy in restraint of trade: joint, collaborative action by dealers . . . and [their common supplier, LOT]" to eliminate JJ's price competition, and deprive the traveling public of "their freedom to deal through discounters if they so choose." *United States v. General Motors Corp.*, 384 U.S. 127, 140 (1966). Under these circumstances, the trial court should have found that LOT joined the Greenpoint Agents' conspiracy.

The trial court erred by testing the entire case through the lens of whether LOT, acting in a purely vertical relationship, chose to terminate its contract with JJ pursuant to an *express* agreement with the conspiring Greenpoint Agents. The trial court's opinion is clearly based on its legal conclusion that because the Greenpoint Agents did not communicate an *express* threat to withdraw their business from LOT unless LOT agreed to terminate JJ, App. C at 16a, and LOT did not *expressly* agree to comply with that demand, then LOT's decision to terminate JJ should be viewed merely as a response to complaints, insulated by *Monsanto*. This led the trial court to ignore the extensive record establishing that LOT did not engage in a simple refusal to deal, but instead acted as part of the broader conspiracy of the Greenpoint Agents.

The Court of Appeals implicitly recognized that the district court applied an incorrect legal standard, *see* App. A at 3a-4a, and said the proper test was whether LOT joined either voluntarily or acted as a result of pressure from the agents. Nevertheless, the Court of Appeals inappropriately felt obligated to apply the trial court's truncated factual findings in determining that issue, assessing the trial court's findings only for "clear error," rather than remanding as required by this Court's ruling in *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). *See* Point IV, *infra*.

Certiorari should be granted so that this Court can state the proper standard for assessing whether a supplier (here, LOT) joined a horizontal conspiracy of its distributors (here, the Greenpoint Agents); provide guidance to lower courts as to the proper evaluation of

evidence of such a conspiracy; and direct a remand for appropriate factfinding as to all issues.

The district court, and by its affirmance, the Court of Appeals, decided important questions of antitrust law in a way that conflicts with relevant decisions of this Court. *S.Ct.Rule* 10. If not corrected by this Court, those errors will have substantial ramifications for the economy and antitrust enforcement. Furthermore, the first question presented -- the proper standard for lower courts to use to differentiate whether a supplier joined a horizontal conspiracy of its distributors seeking to put a rival discounter out of business, rather than merely responding to their complaints -- has divided the lower courts, and should be resolved by this Court.

I. THE TRIAL COURT'S ANALYSIS OF LOT'S PARTICIPATION UNDER THE *COLGATE/MONSANTO* DOCTRINE WAS ERROR

This Court has already declared that a supplier participates in a violation of Section 1 of the Sherman Act when it supports its distributors' "joint action to eliminate [a] discounter[] from participation in the market." *United States v. General Motors Corp.*, 384 U.S. 127, 144 (1966) ["*General Motors*"]. However, the standard for determining whether the supplier in fact participated in such a conspiracy has remained elusive.

This Court has recognized that, in the nature of conspiracies, the supplier's participation usually must be established by circumstantial evidence. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 768 (1984). On the other hand, in order to avoid deterring

pro-competitive behavior, "ambiguous" evidence alone should not permit an inference of conspiracy. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986).

In the present case, the district court assessed LOT's participation through the lens of *Monsanto* and *United States v. Colgate Co.*, 250 U.S. 300 (1919), cases in which suppliers allegedly terminated discounters in furtherance of *supplier-initiated* schemes of resale price maintenance. App. C at 15a. In such a case of *supplier-initiated* restraints, this Court ruled that "[s]omething more than evidence of complaints [by the distributor's competitors] is needed.... There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Monsanto*, at 764. In particular, in such a vertical context, no agreement will be found if the supplier announced its terms in advance and simply refuses to deal with those who fail to comply. *Id.* at 761. Rather, the supplier will only be deemed to have entered a prohibited contract, combination or conspiracy if there is a true "meeting of the minds" beyond the dealer conforming to the supplier's suggested price; "evidence must be presented both that the distributor communicated its acquiescence or agreement and that was sought by the manufacturer." 465 U.S. at 764 n.9. Citing *Monsanto*, the district court required that JJ show that the agents communicated an express threat to withdraw their business from LOT, coupled with some manifestation of assent from LOT beyond responding to complaints by terminating JJ. App. C at 16a.

The *Monsanto* standard, however, is neither fully appropriate nor workable in determining whether suppliers participated in *dealer-initiated* conspiracies. It is not appropriate to use the *Monsanto* standard here. Unlike *supplier-initiated* restrictions, *dealer-initiated* boycotts or price-fixing arrangements have no pro-competitive virtues:

> Vertical price restraints also "might be used to organize cartels at the retailer level." . . . A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement. * * * Historical examples suggest this possibility is a legitimate concern. * * *.
>
> A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. * * * To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. __, 127 S.Ct. 2705, 2717, 168 L.Ed.2d 623, 638 (2007) [citations omitted].

Here we have precisely such a hub-and-spoke arrangement against which *Leegin* cautioned, with the seemingly vertical Paragraph 7 of the VOCA actually being used as a mechanism for LOT to control prices at the levels determined by the conspiring agents.

While judicial restraint is appropriate in respect to wholly vertical conduct, to avoid the risk of chilling interbrand competition, such restraint was unnecessary once there was direct, unambiguous evidence of a dealer conspiracy in operation. In horizontal boycott cases, we discern no ruling of this Court requiring any particular proof of any explicit meeting of the minds to establish that the supplier terminated a discounter in furtherance of the dealers' conspiracy. *See, United States v. General Motors, supra,* 384 U.S. at 143 ("explicit agreement is not a necessary part of a Sherman Act conspiracy"); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 724 (1944) ("Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial"); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960) ("[W]hether an unlawful combination or conspiracy was proved is to be judged by what the parties actually did rather than by the words they used.") To prove LOT joined a dealer conspiracy, therefore, it should have sufficed that JJ showed that LOT "knowing [its] concerted action was a contemplated and invited" by the conspiring Greenpoint Agents "gave

[its] adherence to the scheme and participated in it," *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939), by terminating JJ and giving other assistance to the conspirators.

Colgate and *Monsanto* clearly were not intended to protect suppliers if they accede to the concerted demands of horizontal conspiracies. Instead, those cases simply protect a supplier who, having independently announced a particular policy in advance, acts on its own, and entirely for its own business reasons, in enforcing that policy, even if it becomes aware of violations of the policy from dealer complaints. If the supplier abandons its own policies in favor of policies demanded by a conspiracy of dealers, or otherwise acts, at least in part, to assist the horizontally conspiring dealers who demand a boycott of their rival, the protection of *Monsanto* is lost. *See, e.g., Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 573 (3d Cir. 1986) (liability would attach if the dealers' concerted demands "contributed to GM's decision"); ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, 2005 EDITION (2005) [hereinafter "MODEL JURY INSTRUCTIONS"], Instr. 8 at B80. *See also, JTC Petroleum Co. v. Piasa Motor Fuels*, 190 F.3d 775,778-79 (7th Cir, 1999) (supplier subject to antitrust liability if it served as "cat's paw" to police horizontal price-fixing arrangement).[4]

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[4] For this purpose, moreover, it makes no difference whether LOT had a "true agency" relationship with JJ and the other agents: a supplier-principal is subject to per se antitrust liability where it participates in horizontal efforts by its agents to suppress competition among themselves. *See e.g., Illinois*

(Cont'd)

The true teaching of *Monsanto*, then, may be summarized this way: "A supplier who receives a complaint . . . from a distributor and decides on its own and *entirely for its own business reasons* how it is going to act in response to that complaint . . . is not acting pursuant to an agreement." ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, 2005 EDITION (2005), Instr. 8, at B80 (emphasis supplied). The converse, of course, is that if the supplier does not act on its own, entirely in its own interest, but instead acts in coordination with, and pursuant to, the demands of a conspiracy of its distributors, the supplier cannot be said to have acted unilaterally. LOT's actions went far beyond a simple decision to stop selling to JJ and so precluded the trial court's reliance on the *Colgate* doctrine. When LOT became so far enmeshed in furthering the Greenpoint Agents' horizontal group boycott, its capitulation to the boycotters demands "can by no stretch of the imagination be described as unilateral." *General Motors, supra*, 384 U.S. at 144-45. Indeed:

> not only was the . . . decision to stop dealing with [JJ] an abrupt shift from the past, and not only it is suspicious for [LOT] to deprive itself of a profitable sales outlet, but the record here included . . . direct evidence of communications [with the conspirators].

Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928, 935 (7th Cir. 2000).

(Cont'd)

Corporate Travel, Inc. v. American Airlines, Inc., 806 F.2d 722, 726 (7th Cir. 1986) (airline could be part of horizontal conspiracy if it was enlisted to "orchestrate" agents' scheme).

Paragraph 7 of the VOCA, rather than being used by LOT for its own purposes, was subverted to the use of the conspiring Greenpoint Agents. LOT's contract was relevant only to the extent LOT enforced it pursuant to the Greenpoint Agents' demands, thereby giving the conspirators "power over a competing dealer's price, rather than merely about the level of the ... service activities that other dealers perform.", HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, §11.5d (1994).) In operation, the Greenpoint Agents used Paragraph 7 of the VOCA as a price fixing tool by enlisting LOT in their conspiracy.

II. LOWER COURTS HAVE STRUGGLED IN INTERPRETING THE PROPER STANDARD FOR DETERMINING SUPPLIER PARTICIPATION IN A DISTRIBUTOR CONSPIRACY

The confusion shown in the opinions below as to what evidence must be offered and accepted to establish whether a supplier joined a conspiracy of its dealers is not unique to this case and fully merits this Court's accepting certiorari. *See generally, Continental T.V. Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 47-49 (1977) (accepting certiorari because the issue "has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts.")

Scholars have commented that "Neither the *Monsanto* standard nor any of its predecessor formulas has provided a useful basis for identifying conduct that will be deemed concerted action." William E. Kovacic,

The Identification and Proof of Horizontal Agreements under the Antitrust Laws, 38 ANTITRUST BULL. 5, 24 (1993).[5]

As stated in 1 AMERICAN BAR ASSOCIATION ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (6th ed., 2007) at 19: "Although the Supreme Court has now made clear that termination of a dealer in response to complaints by other dealers does not, by itself, prove concerted action, lower courts have continued to struggle with the issue of what additional evidence is necessary to permit the factfinder to infer a conspiracy."[6] A noted treatise similarly concludes: "... the standard for assessing the reason for a termination [in furtherance of price-fixing] is not entirely clear." 7 PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW, 2D ED. (2003) ¶ 1459d2 at 182. Some Courts of Appeals have expressly noted, moreover, that they find themselves in disagreement with other Courts of Appeal as to whether evidence offered on summary judgment motions "tends to exclude the possibility" that termination resulted from independent conduct, as demanded by the *Monsanto* and *Matsushita* decisions. *See e.g. Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House*

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[5] "Despite a half-century of effort, antitrust law and policy have achieved only modest success in devising a satisfactory definition for the concept of concerted action and creating a suitable methodology for establishing the existence of an agreement in litigation." *Id.*, at 80.

[6] Following the quoted text, the ABA treatise provides a nearly two-pages of footnotes, footnotes number 90 and 91, which list perhaps one hundred cases reaching potentially inconsistent conclusions.

Group, Inc., 878 F.2d 801, 806 n.4 (4th Cir. 1989) (noting disagreement between the 4th, 8th and 11th circuits in this area, *citing McCabe's Furniture v. Laz-Z-Boy Chair Co.*, 798 F.2d 323, 328 (8th Cir. 1986), *and Helicopter Support Systems v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1535-36 & n. 6 (11th Cir. 1987).) The lower courts lay this ambiguity at the feet of this Court, inasmuch as "The Supreme Court has never given much guidance on how courts determine whether an unlawful combination exists for the purpose of Section 1. * * * " *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988) (Reinhart, J., dissenting). This Court should resolve the issue.

III. THE ISSUE IS IMPORTANT TO EFFECTIVE ANTITRUST POLICY

The lack of clarity in respect to what conduct by suppliers will reflect their participation in a horizontal conspiracy of their distributors has pernicious effects. If suppliers can avoid being deemed members of dealer conspiracies merely by claiming they might have had some independent concern about a particular discounter targeted by a cartel of dealers, then it becomes less costly for them to elect to participate in such a group boycott. In contrast to *supplier-initiated* conduct, moreover, there is little risk that finding suppliers participated in *dealer-initiated* restraints will chill pro-competitive conduct. As noted in 7 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, 2D ED. (2003) ¶ 1457 at 145 and 147:

> Termination responses reflecting the manufacturer's own distribution policy differ

> greatly from those imposed upon it by a complaining dealer. In the latter case, the manufacturer's compliance with the complainer's demand is more likely to be anticompetitive . . . favoring reduced competition and higher prices.

All that is at stake are naked horizontal conspiracies to eliminate, or raise the costs of, a rival, offering "no possibility of efficiency and . . . depriv[ing] consumers of an outlet they had shown they wanted." ROBERT BORK, THE ANTITRUST PARADOX (1978) AT 332.

Thus, putting unrealistic, or impossible to hurdle burdens of proof upon plaintiffs to show that the supplier agreed to participate in *dealer-initiated* conspiracies by requiring both *express* demands for the dealers and *express* acquiescence from the supplier creates the risk of ". . . seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement." *Perma Life Mufflers, Inc.. v. International Parts Corp.*, 392 U.S. 134, 139 (1968), *overruled on other grounds, Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

This is an appropriate case to clarify those issues. The only "independent" policy of LOT's that the district court could point to as grounds for LOT's termination was the enforcement of Paragraph 7 of the VOCA itself. But that is what makes it the paradigm case: even the district court acknowledged LOT's enforcement of Paragraph 7 had been "inconsistent" (App. C at 16a) and rare (Finding #26, App. C at 13a pointing to only two prior occasions). It was uncontested that LOT had

encouraged JJ's discounting prior to the Greenpoint Agents' complaints, and even then LOT only began "enforcement" of Paragraph 7 *after* the agents organized the conspiracy and pressed their *concerted* demands. The only reasonable inference was that LOT either preferred or was at least indifferent to discounting (*see* App. C at 18a, conceding LOT's "usual indifference"), prior to the Greenpoint Agents applying pressure through their concerted demands. All the factors that the district court said were sources of concern from JJ's discounting — potential impacts on short-term profits or impacts on "incentives" — were known, anticipated and accepted when LOT signed JJ up to the VOCA in 1995, knowing in advance that JJ was a discounter; and known, anticipated and accepted when LOT renewed JJ's VOCA for 1996. Thus, the only "new" consideration that came into operation was the pressure from the Greenpoint Agents' conspiracy — *exactly* the type of consideration antitrust law prohibits.

IV. THE DISTRICT COURT'S FACTFINDING WAS NECESSARILY "CLEARLY ERRONEOUS" BY REASON OF ITS APPLICATION OF THE INCORRECT LEGAL STANDARD

The district court's factfinding was skewed and "clearly erroneous" because it developed the facts through application of the wrong legal standard. Characterizing the conspirators' April 16, 1996 petition as not constituting "anything more than a complaint by six of J.J.'s 30 to 40 competitors," App. C at 16a-17a, the trial court performed no analysis of the extensive record showing that those six, in the aggregate, had market power, and that LOT danced to their tune, not

only in respect to terminating JJ but in the broader aspects of their conspiracy. This resulted in a sort of tunnel vision, preventing the trial court from performing adequate factfinding as to whether LOT joined a horizontal conspiracy with the agents under horizontal cases such as *General Motors* — indeed its decision fails to cite to that decision. It seems clear that the district court truncated its factual inquiry because it believed LOT, in a vertical relationship, had the right to choose its trading partners, to unilaterally decide who to deal with pursuant to this Court's decisions in *Colgate* and *Monsanto*, distributor conspiracy or no. (Thus, the trial court suggested that a supplier could collude with its dealers only if the dealers made an *express* threat to stop dealing with a "renegade." App. C at 16a.)

The Court of Appeals *accepted* JJ's position on the law, and ruled that the issue of whether LOT joined the horizontal conspiracy had to be evaluated under the tests in *General Motors* and *Leegin*. App. A at 3a. It ruled, however, that under the facts as found by the District Court those elements could not be made out, and that it did not find those findings "clearly erroneous." App. A at 4a. This, too, was error.

The Court of Appeals should have found the district court's fact-finding "clearly erroneous" because it was developed when examining the record through the prism of the incorrect legal standard.

Had the district court given the role of the agents' horizontal conspiracy due consideration, it would have made additional factfinding and reached a different conclusion as to whether LOT joined the agents'

conspiracy and terminated JJ in furtherance of that conspiracy. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982). It would have looked more broadly to see, for example, if LOT's explanations made sense or were pretexual, or involved conduct beyond a simple refusal to deal. It would have examined whether the conspiring dealers had market power.[7] But the district court failed to examine the entire record and perform that analysis because of its erroneous application of the *Monsanto/Colgate* dealing with unilateral *supplier-initiated* actions in the vertical context. In these circumstances the findings should have been declared "clearly erroneous" and the case remanded.

> Where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.

Pullman-Standard v. Swint, *supra*, 456 U.S. at 292.

While this Court "rarely" grants certiorari for the purpose of correcting erroneous factual findings or the misapplication of a properly stated rule of law, *S.Ct.R.* 10, this Court should not hesitate to correct errors in

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[7] The district court stated that LOT had no incentive to increase the compensation agents retained. That ignores the collective power of the agent body: One dealer complaining to its supplier might have "a negligible effect," while "the effect of the combined strength of [a supplier's] principal dealers . . . would hardly be negligible." *Arnold-Pontiac GMC, Inc. v. Budd Baer*, Inc., 826 F.2d 1335, 1339 (3d Cir. 1987). The agents were, in act, able to sustain a huge increase in retained commissions. *See* Point V below.

factfinding when that is essential to help lower courts to correctly address antitrust law. *See*, Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 274, 308-313 (2006). Antitrust provides a candidate case, inasmuch as, like the employment discrimination cases discussed in the Shapiro article, it involves "large numbers of fact-intensive cases," which, in practice:

> make it impossible or very difficult for appellate courts to police uniformity or, at the very least, coherence, in the application of broad standards. The combination of large numbers of fact-intensive cases with vaguely worded standards creates a situation where less may be more: a small number of key precedents — cases decided by the Supreme Court rather than the courts of appeals — could lead to a more clearly marked path for litigants and judges to follow.

Id. at 313.

V. THE LOWER COURTS IMPROPERLY FAILED TO EVALUATE IF THE ENFORCEMENT OF THE VOCA CONSTITUTED AN UNREASONABLE RESTRAINT OF TRADE

Paragraph 7 of the VOCA constituted at all times an *express* agreement on prices in place between LOT and the agents. That arrangement, as enforced, determined not only the charge LOT sought for providing transportation but the charge the agents

would retain from their customers for providing ticketing services. In the context of this case, where LOT abdicated the price-setting function — where price-setting was determined by the prevailing rates of the conspiring Greenpoint Agents and enforced by LOT — and where that conduct raised ticket prices and increased commissions retained by the conspiring agents to the detriment of consumers, we submit the courts were obligated to proceed to evaluate whether the arrangement was an unreasonable restraint of trade. *See Leegin, supra*, 551 U.S. __, 1275 at 2705, 168 L.Ed.2d 623 (rejecting *per se* illegality for vertical resale price maintenance arrangements but remanding for analysis under the Rule of Reason).[8]

The market effects of LOT's termination of JJ were tried by consent. JJ offered evidence through the testimony and report of its expert, Ramsey Shehadeh, Ph.D., showing that LOT's termination of JJ increased the cost of roundtrip tickets between New York and Warsaw by 4.4 percent over the prices which otherwise would have prevailed, and doubled the amount of

[8] In the pre-*Leegin* era, a principal's specification of prices in a "true agency" arrangement was exempted from per se condemnation. *United States v. General Electric Co.*, 272 U.S. 476 (1926); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). Even in "true agency" cases, however, the arrangement could be condemned if it resulted in an unreasonable effect upon competition in a properly defined market. *See, e.g., Illinois Corporate Travel, supra* (restriction on travel agents' price advertising would be tested under Rule of Reason); *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781 (9th Cir. 1996) (even where a "true" agency is established, principal's attempt to set commissions of independent agents could be deemed unlawful restraint under the Rule of Reason).

commissions retained by the conspiring agents. E155, E161-64, E178-79. Having decided that LOT did not join a conspiracy with the other agents, the trial court's opinion did not evaluate this evidence or consider the issue. In these circumstances, however, the courts below should have evaluated whether LOT's actions had an unreasonable effect on competition in fact, pursuant to the Rule of Reason, as requested by JJ's Post-Trial Brief, JA241-249; and JJ's proposed conclusions of law, ##4 and 13-20, at JA334, JA337-42.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 21, 2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-5574-cv

JAN TOKARZ, doing business as J.J. Store,

Plaintiff-Appellant,

-v.-

LOT POLISH AIRLINES, also known as Polskie Linie Lotnicze,

Defendant-Appellee,

BARTOSZ TRAVEL AGENCY, INC., MILLENIUM TOURS, P & F INTERNATIONAL, INC., AMERICAN TRAVEL ABROAD, INC. and KATHLEEN ANNE ROBERTS, ESQ.,

Defendants.

PRESENT:

Hon. GUIDO CALABRESI,
Hon. JOSÉ A. CABRANES,
Hon. SONIA SOTOMAYOR,
Circuit Judges.

Appendix A

SUMMARY ORDER

Plaintiff-Appellant Jan Tokarz, doing business as J.J. Store ("J.J." or "Appellant") appeals from a decision of the district court, following a bench trial, dismissing its various claims against Defendant-Appellee LOT Polish Airlines ("LOT" or "Appellee"). *Tokarz v. LOT Polish Airlines*, No. 96-CV-3154, 2006 WL 2850611 (E.D.N.Y. Oct. 3, 2006). Before this Court, J.J. challenges the dismissal only of its claim-made under Section 1 of the Sherman Act, 15 U.S.C. § 1, and the New York Donnelly Act, N.Y. Gen. Bus. L. § 340-that LOT participated in a conspiracy in restraint of trade with various travel agencies in Greenpoint, Brooklyn ("Greenpoint Agents"). We assume the parties' familiarity with the facts, procedural history, and scope of the issues presented on appeal.

Appellant argues that its complaint is best analyzed as asserting a horizontal conspiracy, which, as we have held, requires a court to determine (1) whether the alleged participants had the capacity to conspire, and (2) whether there was an actual conspiracy. *Capital Imaging Assocs. P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 544-45 (2d Cir.1993). The capacity to conspire "is determined by the economic realities of the alleged coconspirators' relationship." *Belfiore v. New York Times Co.*, 826 F.2d 177, 182 (2d Cir.1987). In this case, such analysis would turn on whether, for the purposes of distributing tickets on LOT Polish Airlines, the Greenpoint Agents were common entities with, or economically distinct from, LOT. The district court did

not address, in its decision, whether LOT and the Greenpoint Agents had the capacity to conspire. In its oral decision on the motions for summary judgment, however, the district court found that it could not say as a matter of law that the various defendants did *not* have the capacity to conspire with each other. For purposes of this order, we will assume *arguendo* the capacity to conspire and turn to the second prong of analysis.

Though determining whether an actual conspiracy exists necessarily requires factual findings, "the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act" is a matter of law, reviewed *de novo. United States v. General Motors Corp.*, 384 U.S. 127, 142 n. 16, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). In order to show an actual conspiracy, Appellant must demonstrate that LOT was involved with the Greenpoint Agents in a manner "designed to achieve an unlawful objective," *Capital Imaging,* 996 F.2d at 545. This involvement could occur either through a voluntary agreement on LOT's part, with the Greenpoint Agents, or as a result of unlawful pressure on LOT by the Greenpoint Agents.

Appellant did not proffer evidence sufficient to establish that LOT voluntarily engaged with the Greenpoint Agents in a conspiracy to boycott J.J. Store. Appellant argues that LOT was forced by the Greenpoint Agents into terminating the relationship between LOT and J.J.-a claim which, if supported, would make LOT's action an impermissible refusal to deal in aid of a

horizontal conspiracy by the non-terminated Agents. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S.Ct. 2705, 2717, 168 L.Ed.2d 623 (2007). But this assertion of coercion fails on the facts found by the district court. Upon review of the record before us, we conclude that the court's factual findings were not clearly erroneous. We therefore affirm the district court's determination that there was no conspiracy.

We have considered all of Appellants' claims and find them to be without merit. The judgment of the district court is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

By: _____

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 3, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-96-3154(FB)(JA)

JAN TOKARZ, d/b/a J.J. STORE,

Plaintiff,

VS.

LOT POLISH AIRLINES, a/k/a POLSKIE LINIE LOTNICIZE, MILLENIUM TOURS, P&F INTERNATIONAL INC., and AMERICAN TRAVEL ABROAD, INC.,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by the Court. This action came to trial before the Court on January 23-26, 2006. On September 29, 2006 the Court issued a Memorandum and Order reciting its findings of facts and conclusions of law, dismissing Counts I and III-VI of plaintiff's Amended Complaint, and directing the parties to negotiate in good faith regarding the amount of unpaid commissions sought in Count II. On October 31, 2006 the parties filed

a stipulation agreeing to the entry of judgment in favor of plaintiff on Count II, in the amount of $112,500.00, inclusive of interest and costs. Accordingly it is hereby

ORDERED AND ADJUDGED THAT ON COUNT II OF THE AMENDED COMPLAINT, PLAINTIFF, JAN TOKARZ, d/b/a J.J. STORE, SHALL RECOVER FROM DEFENDANT LOT POLISH AIRLINES, a/k/a POLSKIE LINIE LOTNICIZE, THE SUM OF $112,500.00, WHICH SHALL ACCRUE INTEREST PURSUANT TO 28 U.S.C. § 1961 UNTIL PAID. ALL OTHER COUNTS OF THE AMENDED COMPLAINT ARE DISMISSED WITH PREJUDICE. EXCEPT INSOFAR AS THE STIPULATED AMOUNT OF UNPAID COMMISSIONS INCLUDES COSTS, THE PARTIES SHALL BEAR THEIR OWN COSTS.

11/3/06
DATE

ROBERT C. HEINEMANN
CLERK OF THE COURT

s/ [illegible]
(By) DEPUTY CLERK

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED SEPTEMBER 29, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case No. 96 CV 3154 (FB) (JMA)

JAN TOKARZ, d/b/a J.J. STORE,

Plaintiff,

-against-

LOT POLISH AIRLINES, a/k/a POLSKIE LINIE LOTNICIZE, MILLENIUM TOURS, P & F INTERNATIONAL, INC., and AMERICAN TRAVEL ABROAD, INC.,

Defendants.

MEMORANDUM AND ORDER

BLOCK, Senior District Judge:

INTRODUCTION

Plaintiff, Jan Tokarz, d/b/a J.J. Store ("J.J."), sues defendant LOT Polish Airlines, a/k/a Polskie Linie

Lotnicize ("LOT").[1] As it is undisputed that the Polish government owns the majority interest in LOT, jurisdiction is proper under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 & 1602-11.

In an amended complaint dated September 29, 1998, J.J. asserts claims for breach of contract, fraud, tortious interference with prospective economic advantage, and violations of antitrust law; all claims arise out of LOT's termination of J.J.'s authority to sell LOT tickets and an ancillary commission agreement. A bench trial was held on January 23-26, 2006. Pursuant to Federal Rule of Civil Procedure 52(a), the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. LOT provides nonstop service between New York and Poland; other carriers also provide service between New York and Poland, but with stops at their respective European hubs.

2. LOT distributes its tickets through a system of authorized agents, some of whom deal directly with the

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1. J.J. has also sued three other defendants: P & F International, Inc. ("P & F"), American Travel Abroad, Inc. ("AmTA"), and Millenium Tours ("Millenium"). P & F, though served, has never appeared in the action. The parties have stipulated to dismiss AmTA without prejudice, and to join Millenium as a defendant in a related case, *Tokarz v. Albatross Travel, et al.*, Case No. 00-CV-3372 (E .D.N.Y.), which has been stayed pending the outcome of this case.

ticket-buying public, and some of whom (known as "wholesalers") deal with intermediaries (known as "subagents") who, in turn, deal with the public.

3. During the relevant time period, LOT offered its agents a base commission of 10%.

4. LOT also offered certain agents a "Volume Override Commission Agreement," or "VOCA," under which LOT agreed to pay "override" commissions over and above the 10% base commission based on the volume of the agent's ticket sales.

5. Under LOT's VOCA, the agent was entitled to deduct the base commissions, plus a portion of the override commissions, from the amounts remitted to LOT ("the front end"); the remainder of the override commissions due were paid by LOT after the end of the year ("the back end").

6. Paragraph 7 of LOT's VOCA provided that "[n]o portion of the override commission paid may be used in any way to reduce the airfare paid by the passenger below LOT published transatlantic tariffs," Pl.'s Exs. 1 & 2; thus, as LOT's sales director for the United States, Pawel Lodzinski ("Lodzinski"), testified at his deposition, "anytime an agent sells below [the] face value the ticket, [the] agent breaches the contract." Def.'s Ex. X, at 67:16-17.

7. A VOCA remained in effect for one calendar year; however, paragraph 9 of the VOCA provided that either

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"AGENT or LOT may terminate th[e] Agreement by giving the other party one month notice in writing." *Id.*

8. J.J. is a family-run business in Greenpoint, Brooklyn, offering a number of goods and services to the large Polish community there.

9. In the early 1990s, J.J. began selling airline tickets, principally to Poland and principally on LOT.

10. J.J. initially sold tickets as a subagent for authorized ticket agents.

11. In 1995, J.J. received accreditation from the Airlines Reporting Corporation and the International Airlines Travel Agent Network; by virtue of these accreditations, J.J. became an authorized agent for LOT and other airlines.

12. In May 1995, LOT and J.J. entered into a VOCA for the 1995 calendar year under which LOT agreed to pay J.J. the base commission of 10% plus override commissions that ranged between 1% and 8% depending on the volume of J.J.'s sales; J.J. was entitled to retain between 1% and 7% of the override commissions at the front end, with LOT making up the difference at the back end.

13. On January 6, 1996, LOT and J.J. entered into a VOCA for the 1996 calendar year under which LOT agreed to pay J.J. the base commission of 10% plus override commissions of between 3% and 6% depending

on the volume of J.J.'s sales; J.J. was entitled to retain between 3% and 4% of the override commissions at the front end, with LOT making up the difference at the back end.

14. There are approximately 30-40 travel agencies selling LOT tickets in the Greenpoint area; these agencies compete by passing along varying portions of their commissions to customers, thereby effectively discounting ticket prices below LOT's published fares.

15. During the relevant time period, J.J.'s competitor retained, on average, 6% of their commissions, passing the remainder on to customers.

16. During the same time period, J.J. retained, on average, 0% of its front-end commissions, passing 100% of those commissions—both base and override-on to customers and expecting to do business in a volume sufficient to earn back-end commissions.

17. J.J.'s practice of passing on its front-end override commissions to customers was a breach of Paragraph 7 of the VOCA; although other agents also sometimes passed part of their override commissions on to customers, no agent did so to the same extent that J.J. did.

18. At some point in 1995, one of J.J.'s competitors, Peter Pachecz ("Pachecz"), complained to Lodzinski about J.J.'s prices, expressing concern that J.J. had negotiated a better deal with LOT; Lodzinski told Pachecz to submit his complaint in writing.

19. On December 13, 1995, Lodzinski sent J.J. a letter "to inform you that selling methods used by your agency do not conform with the [1995 VOCA] and specifically with Paragraph 7 of that Agreement," Pl.'s Ex. 3; in the letter, Lodzinski asked J.J. "to refrain immediately from selling LOT services at dumping prices," and warned that if J.J. did not honor the request, "we shall be forced to take more drastic measures to ensure protection of our interests." *Id.*

20. On April 16, 1996, Pachacz and five other Greenpoint travel agents sent Lodzinski a letter accusing J.J. of selling LOT tickets "in a manner compromising [the] principle of healthy competition," and asking LOT to reevaluate its decision to make J.J. an authorized agent, Pl.'s Ex. 8; the letter made no mention of any threats to stop selling LOT tickets or to take any other action if LOT continued to deal with J.J.

21. On April 22, 1996, Lodzinski sent J.J. a letter "categorically declar [ing]" that its continued "method of dumping LOT Polish Airlines tickets [is] against our interest in the USA and contradict[s][the] conditions of [the VOCA] for 1996," and prohibiting J.J. from deducting anything more than the 10% base commission from LOT fares. Pl.'s Ex. 5.

22. On May 28, 1996, Lodzinski sent J.J. yet another letter reiterating that LOT had "requested immediate discontinuation of rebating from published fares," and warning that "our patience has expired. After June 01, we will have no alternative but to exercise more drastic measures." Pl.'s Ex. 7.

23. On June 12, 1996, LOT revoked J.J.'s authorization to sell LOT tickets.

24. On July 1, 1996, Lodzinski sent J.J. a letter "confirming termination of the [VOCA], due to J.J. Store's material breach of the Agreement," Pl.'s Ex. 14, i.e., J.J.'s use of all of its up-front commissions to discount published airfares in violation of Paragraph 7 of the VOCA.

25. Although LOT did not enforce Paragraph 7 against agents who retained at least some of their up-front commission, agents who passed all of that commission on to customers were of special concern to LOT; the Court credits Lodzinski's deposition testimony that an agent who made no front-end profit on ticket sales (1) posed a credit risk in that part of the agent's weekly remittances to LOT would have to come out of the agent's own pocket, see Defs. Ex. X, at 44-45 ("[A]gents who sell below [their] own costs put[ ] . . . an airline in risk," and (2) disrupted the incentive to sell LOT tickets-as opposed to tickets on other airlines-that the commission structure was intended to create. See id. at 47:11-13 ("[W]e . . . want travel agents to make money because we don't believe that travel agents are selling a given airline for making no profit on it.").

26. LOT has, on at least two other occasions, terminated agents for using all of their up-front commission to discount ticket prices.

27. Because an increase in commissions would increase the overall price customers paid for LOT tickets, LOT—which competes, to some extent, with other airlines-had no economic incentive to assist its agents in increasing their retained commissions.

28. Based on the foregoing facts, the Court finds that LOT's termination of its VOCA with J.J. was a unilateral decision to enforce Paragraph 7, as LOT was contractually entitled to do, and not part of any concerted action with J.J.'s competitors to maintain or increase retained commissions.

CONCLUSIONS OF LAW

A. Antitrust Claims

The bench trial focused exclusively on J.J.'s claims that LOT terminated its VOCA (1) to assist J.J.'s competitors in an attempt to fix their retained commissions (Count IV), and (2) to attempt to fix the resale price of its tickets (Count V). Both claims are based on section 1 of the federal Sherman Act, 15 U.S.C. § 1, and New York's Donnelly Act, N.Y. Gen. Bus. L. § 340; as the two statutes are identical in all material respects, there is no need to analyze them separately. *See Kramer v. Pollock-Krasner Foundation*, 890 F.Supp. 250, 254 (S.D.N.Y.1995) ("[T]he Donnelly Act was modelled on the Sherman Act and should be construed in light of federal precedent.").

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Section 1 of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is . . . illegal." 15 U.S.C. § 1. Thus, to succeed on any section 1 claim, the plaintiff "must first establish a combination or some form of concerted action between at least two legally distinct economic entities." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir.1993). To discharge this burden, the plaintiff must prove, by a preponderance of the evidence "that the [alleged] conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

By contrast, "[u]nilateral conduct on the part of a single person or enterprise falls outside the purview of this provision in the antitrust law." *Capital Imaging Assocs.*, 996 F.2d at 542. Of particular relevance here are the Supreme Court's admonitions in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), that a single entity (such as LOT) "generally has a right to deal, or refuse to deal, with whomever it likes, so long as it does so independently," *id.* at 761, and "can announce its resale prices in advance and refuse to deal with those who fail to comply." *Id.* (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919)).

In deciding whether an antitrust defendant's conduct was unilateral or part of a conspiracy, "[l]ack of motive bears on the range of permissible conclusions

that might be drawn from ambiguous evidence: if [the defendant] had no rational economic motive to conspire, and if [its] conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986); see also id. at 587 ("[I]f the factual context renders [an antitrust plaintiff's] claim implausible—if the claim is one that simply makes no economic sense—[the plaintiff] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary."). Moreover, when, as here, an antitrust claim is brought by a terminated distributor, "something more than evidence of complaints [by the distributor's competitors] is needed." *Monsanto*, 465 U.S. at 764. "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.*

The only evidence suggesting that LOT's action was anything other than unilateral is (1) complaints by J.J.'s competitors, culminating in the April 16, 2006 letter, and (2) LOT's inconsistent enforcement of Paragraph 7. With regard to competitor complaints, there may well be circumstances in which an airline has a motive to collude with its agents to drive a renegade agent out of the market; for example, a letter from several agents threatening to stop doing business with the airline unless the renegade is terminated might lead the airline to comply and join the conspiracy. Here, however, there is no evidence that LOT perceived the April 16th letter as anything more than a complaint by six of J.J.'s 30 to 40

competitors; as the Supreme Court noted, such "complaints about price-cutters are natural-and from the manufacturer's perspective, unavoidable-reactions by distributors to the activities of their rivals." *Monsanto*, 465 U.S. at 763 (internal quotation marks omitted). With regard to LOT's enforcement of Paragraph 7, the Court credits LOT's proffered explanation that J.J.'s price-cutting practices justified a departure from its usual indifference to agents' use of their commissions to create customer discounts.

In sum, J.J. failed to demonstrate the LOT terminated its VOCA in furtherance of a common plan with other Greenpoint agents to fix either retained commissions or ticket prices. As a result, J.J. cannot prevail on its antitrust claims.

B. Other Claims

Although not addressed at trial or in post-trial submissions, J.J.'s claims for breach of contract, tortious interference and fraud have not been formally withdrawn; nevertheless, with one exception, J.J. cannot prevail on those claims.

J.J. claims that LOT's termination of its VOCA was a breach of that agreement. The VOCA, however, plainly provides that either party may terminate the agreement on thirty days' written notice. As LOT provided the requisite notice, it was entirely within its contractual rights in terminating the agreement. LOT concedes, however, that it has not paid J.J. all commissions due

for the period when the VOCA was still in effect; the amount of the commissions owed remains in dispute.

In its tortious interference claim, J.J. alleges that LOT's termination of its VOCA interfered with J.J.'s relationship with its customers. While perhaps true, J.J. must also establish, *inter alia*, that "the defendant acted solely out of malice, or used dishonest, unfair, or improper means," *Carvel Corp. v. Noonan*, 350 F.3d 6, 17 (2d Cir.2003); as noted, LOT's termination of its VOCA with J.J. was a proper exercise of its contractual rights.

In its fraud claim, J.J. alleges that in negotiating the 1996 VOCA, LOT intentionally misrepresented that it was offering the same deal to all its agents. Even assuming that to be true, J.J.'s claim that but for the misrepresentation, it would have secured more favorable terms in the 1996 VOCA is sheer speculation.

CONCLUSION

All of J.J.'s claims against LOT are dismissed, except to the extent that J.J. seeks unpaid commissions for the period during which its VOCA with LOT was in effect.[2] On that issue, the parties are directed to negotiate in good faith the amount of commissions owed, and if no settlement is reached, to appear on Tuesday, October 24, 2006, at 11:00 a.m. to set a hearing date.

SO ORDERED.

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2. LOT contends that the unpaid commissions total $28,358.45, while J.J. contends that they total $97,728.00.

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/signed/
FREDERICK BLOCK
Senior United States District Judge

Brooklyn, New York
September 29, 2006

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED MARCH 4, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of March two thousand and eight,

No. 06-5574-cv

JAN TOKARZ, doing business as J.J. Store,

Plaintiff-Appellant,

v.

LOT POLISH AIRLINES, also known as Polskie Linie Lotnicze,

Defendants.

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ORDER

Appellant Jan Tokarz having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe Clerk

By: s/ Frank Perez
Frank Perez, Deputy Clerk